

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00981-CMA-MEH

HEIDI GILBERT,
AMBER MEANS,
MANDY MELOON,
GABRIELA JOSLIN,
KAY POE, and
JANE DOES 6–50,

Plaintiffs,

v.

UNITED STATES OLYMPIC COMMITTEE,
USA TAEKWONDO, INC.,
U.S. CENTER FOR SAFESPORT,
STEVEN LOPEZ,
JEAN LOPEZ, and
JOHN DOES 1–5,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Plaintiffs’ Second Amended Complaint (“SAC”) asserts twenty-one claims against the various Defendants. Of those claims, Plaintiffs assert five against the U.S. Center for SafeSport (“SafeSport”): Claim 14 for obstruction under 18 U.S.C. § 1590(b); Claim 15 under the Racketeer Influenced and Corrupt Organizations Act (“RICO”); Claim 19 for negligence; Claim 20 for gross negligence; and Claim 21 for outrageous conduct. SafeSport has filed a Motion to Dismiss arguing it enjoys absolutely immunity from this lawsuit. It also argues that Plaintiffs lack standing to bring their suit, and alternatively, Plaintiffs fail to plausibly state claims for relief. I agree SafeSport is

entitled to absolute immunity from Plaintiffs' claims and that Plaintiffs lack standing to bring a RICO claim. Therefore, I respectfully recommend the Motion be **granted**.

BACKGROUND

Plaintiffs in this lawsuit are female taekwondo athletes who sought to compete for Team USA. Plaintiffs allege that, during the time they participated and competed in the USA Taekwondo, Inc. ("USAT") system, they were sexually abused, assaulted, and raped by Steven and Jean Lopez (the "Lopez Defendants"), who are prominent members of the United States taekwondo community. In a contemporaneously filed Recommendation, I address the merits of the Motions to Dismiss filed by Defendants United States Olympic Committee ("USOC"), USAT, and the Lopez Defendants. As to those Defendants, I recommend that some claims proceed while others be dismissed. I incorporate the "Background" section, which includes Plaintiffs' allegations in the SAC, from that Recommendation into this one. Also of relevance from that Recommendation, I found Plaintiffs do not have standing to bring a RICO claim (Claim 15). That conclusion applies equally here, and I recommend that Claim 15 against SafeSport be dismissed for the same reasons.

In addition to those allegations already incorporated, the following factual allegations from the SAC are taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The USOC first created a working group to form SafeSport in spring 2010. SAC ¶ 282. However, the USOC's Chief Executive Officer, Scott Blackmun, testified to Congress that "[SafeSport] did not get up and running as quickly as I would have liked," and it did not open its doors until March 2017. *Id.*

Congress passed the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318, on February 14, 2018. In it, Congress dictated that “[t]he United States Center for Safe Sport shall serve as the independent national safe sport organization and be recognized worldwide as the independent national safe sport organization for the United States[.]” § 202(a), 132 Stat. at 320 (codified at 36 U.S.C. § 220541(a)(1)). Its congressionally established responsibilities include “exercis[ing] jurisdiction over the [USOC and] each national governing body . . . with regard to safeguarding amateur athletes against . . . sexual abuse[] in sports[.]” *Id.* (codified at 36 U.S.C. § 220541(a)(2)). Congress also charged it with the obligation to “establish mechanisms that allow for the reporting, investigation, and resolution . . . of alleged sexual abuse in violation of the Center’s policies and procedures” *Id.* § 202(a), 132 Stat. at 321 (codified at 36 U.S.C. § 220541(a)(4)). Congress authorized SafeSport to “utilize a neutral arbitration body . . . to resolve allegations of sexual abuse within its jurisdiction to determine the opportunity of any amateur athlete . . . who is the subject of such an allegation, to participate in amateur athletic competition.” *Id.* (codified at 36 U.S.C. § 220541(a)(4)).

SafeSport first began investigating complaints against Steven Lopez in March 2017, when it assumed USAT’s active investigation led by Donald Alperstein. *Id.* ¶ 236. That investigation lasted until May 2018, *id.*, or approximately fifteen months. Plaintiffs allege this is significantly longer than the average SafeSport investigation, which lasts about sixty-three days. *Id.* They also assert USAT abruptly suspended Steven Lopez on May 7, 2018, shortly after Plaintiffs filed the First Amended Complaint in this lawsuit. *Id.* ¶¶ 236–37.

Additionally, in April 2018, SafeSport announced it had imposed a lifetime ban on Jean Lopez from USAT for his “decades long pattern of sexual misconduct.” *Id.* ¶¶ 11, 945(g).

Plaintiffs allege that when SafeSport announced this suspension, they each felt a sense of relief and vindication. *Id.* ¶¶ 479–80, 518–19, 593–94, 650, 718. But in August 2018, SafeSport lifted the suspension after Plaintiffs in this case refused to present live testimony at Jean Lopez’s appeal of the SafeSport suspension. *Id.* ¶¶ 18–19. Plaintiffs claim that, as a result of SafeSport’s decision to reinstate Jean Lopez, Plaintiffs’ reputations were injured in the taekwondo community, *id.* ¶¶ 482, 521, 598, 652, 720, and they suffered emotional and mental distress, *id.* ¶¶ 484, 597, 651, 720. Plaintiffs allege the decision to reinstate Jean Lopez “was reckless and haphazard.” *Id.* ¶ 20. They assert that “[i]n abandoning the case against Jean Lopez on appeal, the USOC and SafeSport have violated their institutional duty to Plaintiffs and the other victims of Jean.” *Id.* ¶ 21.

LEGAL STANDARDS

I. Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) empowers a court to dismiss a complaint for “lack of subject matter jurisdiction.” Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff’s case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction “must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking.” *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 906 F.3d 926, 931 (10th Cir. 2018) (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)). A Rule 12(b)(1) motion to dismiss must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *McKenzie v. U.S. Citizenship & Immigration Servs., Dist. Dir.*, 761 F.3d

1149, 1154 (10th Cir. 2014). Accordingly, the Plaintiff in this case bears the burden of establishing that the Court has jurisdiction to hear his claims.

Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.

Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Id. at 1002–03 (citations omitted). The present motion launches a facial attack on this Court's subject matter jurisdiction; therefore, the Court will accept the truthfulness of the SAC's factual allegations for its Rule 12(b)(1) analysis.

II. Fed. R. Civ. P. 12(b)(6)

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* *Twombly* requires a two-prong analysis. First, a court must identify “the allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations that are legal conclusions, bare assertions, or merely conclusory. *Id.* at 678–80. Second, the Court must consider the factual allegations “to determine if they plausibly suggest an entitlement to relief.”

Id. at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 680.

Plausibility refers “to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible.” *SEC v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) (quoting *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012)). “The nature and specificity of the allegations required to state a plausible claim will vary based on context.” *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (quoting *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011)). Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1191.

However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. The complaint must provide “more than labels and conclusions” or merely “a formulaic recitation of the elements of a cause of action,” so that “courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” the complaint has made an allegation, “but it has not shown that the pleader is entitled to relief.” *Id.* (quotation marks and citation omitted).

ANALYSIS

Of paramount importance, SafeSport asserts that it enjoys absolute immunity from Plaintiffs' claims. SafeSport's Mot. Dismiss 9–11, ECF No. 105; SafeSport's Reply 3–7, ECF No. 144. SafeSport argues that permitting this suit would “defeat the congressional mandate that [it] have discretion to resolve sexual misconduct allegations in amateur athletics.” SafeSport's Mot. Dismiss 7. It contends that immunity is essential to allow it to effectuate its duty to impartially and fairly resolve complaints of misconduct within its jurisdiction. SafeSport's Reply 4. SafeSport argues “Plaintiffs are suing [it] because they disagree with its . . . decision on when and how to conduct arbitration over Jean Lopez's lifetime ban.” SafeSport's Mot. Dismiss 10. But it argues it cannot be subject to suit for its eligibility decisions, because immunity serves to protect it for acts in its adjudicatory and prosecutorial capacity. SafeSport's Reply 5. I agree. The policy considerations that determine whether a party is protected by absolute immunity are squarely aligned with the issues that are presented by Plaintiffs' claims.

Certain policy considerations “have led to the creation of various forms of immunity from suit for certain government officials.” *Forrester v. White*, 484 U.S. 219, 223 (1988). Specifically, the Supreme Court has recognized that “[s]pecial problems arise . . . when government officials are exposed to liability for damages.” *Id.* For those officials, “the threat of liability can create perverse incentives that operate to inhibit [them] in the proper performance of their duties.” *Id.*

As a primary example, “[f]ew doctrines [a]re more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction” *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967). This immunity “protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants.” *Forrester*, 484 U.S. at 225.

Judicial immunity extends further than strictly to judges. For example, prosecutors are also entitled to its protections. “The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges . . . acting within the scope of their duties.” *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976). “It is well established that prosecutors are absolutely immune from suit . . . concerning activities ‘intimately associated with the judicial . . . process,’ such as initiating and pursuing criminal prosecutions.” *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991) (quoting *Imbler*, 424 U.S. at 430–31). The policy that drives this immunity includes the “concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.” *Imbler*, 424 U.S. at 423. This is because “[t]he function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution” *Imbler*, 424 U.S. at 421. In *Imbler*, the Supreme Court quoted the following passage with approval:

“The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . .”

Id. at 422–25 (last alteration in original) (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. Dist. Ct. App. 1935)). Although the passage contemplates a civil lawsuit by an individual who the prosecutor charged but failed to convict, the reasoning also applies if alleged victims of the person charged could bring a civil suit against the prosecutor when he decided to dismiss the charges.

Schloss v. Bouse, 876 F.2d 287, 290 (2d Cir. 1989) (“[A]s a matter of logic, absolute immunity must also protect the prosecutor from damages suits based on his decision not to prosecute.”).

Further still, the Supreme Court has held that absolute immunity extends not just to state prosecutors, but also to “agency officials performing certain functions analogous to those of a prosecutor” *Butz v. Economou*, 438 U.S. 478, 515 (1978); *see also Forrester*, 484 U.S. at 225–26 (noting this immunity extends “to Executive Branch officials who perform quasi-judicial functions, or who perform prosecutorial functions that are ‘intimately associated with the judicial phase of the criminal process’” (citation omitted) (quoting *Imbler*, 484 U.S. at 430)). This is because “[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor’s decision to initiate or move forward with a criminal prosecution.” *Id.* The identical policy considerations drive this form of immunity. Absent protection from suit, “[t]he discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.” *Id.* (citing *Imbler*, 484 U.S. at 426 n.24).

Finally, while the entire preceding discussion involved immunity in the context of government actors, the Tenth Circuit has recognized that private actors can be protected by the same quasi-judicial and quasi-prosecutorial immunities when the relevant policy interests support such a finding. For example, the Tenth Circuit has adopted the doctrine of arbitral immunity, under which “arbitrators acting within their quasi-judicial duties are the functional equivalent of judges and, as such, should be afforded similar protection.” *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007). Like other immunities, “arbitral immunity has been held to be ‘essential to protect the decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.’” *Id.* (quoting *New England*

Cleaning Servs., Inc. v. Am. Arbitration Ass’n, 199 F.3d 542, 545 (1st Cir. 1999)). As support for its conclusion that arbitrators should be entitled to this protection, the Tenth Circuit stated, “there are certain persons whose special functions require a full exemption from liability for acts committed within the scope of their duties.” *Id.* at 1159. The court embraced the Supreme Court’s rationale that it was “necessary to protect the decision-makers from bias or intimidation caused by fear of a lawsuit arising out of the exercise of their official functions.” *Id.*

Whether a party is protected by absolute immunity is decided by the applicability of the relevant policy considerations, not strictly by the identity of the party. “In determining whether particular acts of government officials are eligible for absolute immunity, [the Tenth Circuit] appl[ies] a ‘functional approach . . . which looks to the nature of the function performed, not the identity of the actor who performed it.’” *Malik v. Arapahoe Cty. Dep’t of Soc. Servs.*, 191 F.3d 1306, 1314 (10th Cir. 1999) (alteration in original) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, (1993)). “A defendant who seeks exemption from personal liability on the basis of absolute immunity bears ‘the burden of showing that such an exemption is justified by overriding considerations of public policy.’” *Jones v. Espanola Mun. Sch. Dist.*, No. 1:13-cv-00741 RB/WPL, 2014 WL 12782792, at *5 (D.N.M. Dec. 9, 2014) (quoting *Forrester*, 484 U.S. at 224).

In this case, SafeSport argues that the policy interests justifying quasi-judicial and quasi-prosecutorial immunity dictate that it be provided such protection here. SafeSport’s Reply 3. To make this determination, I must take a “functional approach” and look not to the identity of the actor, but to “the nature of the function performed.” *Malik*, 191 F.3d at 1314. “The more distant a function is from the judicial process, the less likely absolute immunity will attach.” *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990). SafeSport bears the burden of showing immunity “is justified by overriding considerations of public policy.” *Jones*, 2014 WL 12782792, at *5.

At issue here is SafeSport’s responsibility to “establish mechanisms that allow for the . . . resolution . . . of alleged sexual abuse” 36 U.S.C. § 220541(a)(4). Of additional note, Congress has stated SafeSport must “ensure” such mechanisms “provide fair notice and an opportunity to be heard” § 220541(a)(5). In this suit, Plaintiffs allege SafeSport imposed a lifetime ban on Jean Lopez from USAT in April 2018 for his “decades long pattern of sexual misconduct.” SAC ¶¶ 11, 945(g). However, Plaintiffs also allege Jean appealed the suspension, and SafeSport rescinded it after Plaintiffs refused to present live testimony at that appeal. *Id.* ¶¶ 18–19. Plaintiffs claim that, as a result of SafeSport’s decision to reinstate Jean, their reputations were injured in the taekwondo community, *id.* ¶¶ 482, 521, 598, 652, 720, and they suffered emotional and mental distress, *id.* ¶¶ 484, 597, 651, 720.

Plaintiffs’ claims against SafeSport are based on its decision to “abandon[] the case against Jean Lopez on appeal,” which led to his reinstatement. *Id.* ¶ 21. To support their negligence claim, Plaintiffs allege, “Because the ban on Jean Lopez was revoked and Jean was reinstated in August 2018 by SafeSport, Plaintiffs have suffered severe emotional injuries and have suffered reputational damages.” *Id.* ¶ 947. To support the gross negligence claim, Plaintiffs allege, “SafeSport, in conscious disregard of the safety and welfare of female taekwondo athletes, including Plaintiffs, reinstated Jean Lopez in August 2018 despite already finding him to be a serial rapist of female athletes.” *Id.* ¶ 954(n). Plaintiffs’ outrageous conduct claim is based on “SafeSport’s shocking move to condition the ban on Plaintiffs reliving their abuse” *Id.* ¶ 964. Plaintiffs base the obstruction claim on SafeSport “abandoning [its] investigation of Jean Lopez on appeal in August 2018[.]” *Id.* ¶ 836(o).

Applying the functional approach, I find that Plaintiffs challenge SafeSport’s role as a “prosecutor” of alleged sexual abuse in that they allege SafeSport failed or refused to “pursu[e]

the case against Jean.” *Id.* ¶ 21. This role is distinguishable from those addressed by the Tenth Circuit in which the court held that a party is not entitled to absolute immunity when not serving in a role closely related to the judicial function. *See e.g., Snell*, 920 F.2d at 691 (the court concluded that “child welfare workers investigating claims of child abuse are analogous to law enforcement officers who are entitled only to qualified immunity”). In this case, Plaintiffs challenge SafeSport’s decision not to pursue the case against Jean on his appeal after previously banning him for life. *See* SAC ¶¶ 21, 481–82, 520, 597, 651, 720. Plaintiffs specifically allege “SafeSport abruptly decided to abandon its suspension of Jean Lopez under the false pretext that the Plaintiffs in this lawsuit declined to present live testimony during Jean’s appeal.” *Id.* ¶ 18. Abandoning a suspension decision is not a “distant function” removed from the “judicial process” such as the investigations considered in *Snell*. 920 F.2d at 687. I find SafeSport’s decision is akin to that as a “prosecutor” closely associated with the judicial process, and SafeSport is protected by absolute immunity from liability for its decision.

Prosecutorial immunity protects a prosecutor’s decision to bring, or not to bring, charges against an individual. “It is well established that prosecutors are absolutely immune from suit . . . concerning activities ‘intimately associated with the judicial . . . process,’ such as initiating and pursuing criminal prosecutions.” *Pfeiffer*, 929 F.2d at 1489 (quoting *Imbler*, 424 U.S. at 430–31). “[A]bsolute immunity must also protect the prosecutor from damages suits based on his decision not to prosecute.” *Schloss*, 876 F.2d at 290. Permitting suits against SafeSport for its eligibility decision would lead to the potential that “harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.” *Imbler*, 424 U.S. at 423.

Indeed, Congress has placed SafeSport in a position of profound public trust. It is responsible for “resolv[ing] allegations of sexual abuse within its jurisdiction to determine the opportunity of any amateur athlete . . . who is the subject of such an allegation, to participate in amateur athletic competition.” § 220541(c)(1). In their Response brief, Plaintiffs represent that “just one year after opening its doors[,] SafeSport received its 1000th complaint.” Resp. 3, ECF No. 140. But this demonstrates the need for immunity, for if SafeSport were subject to suit by every disappointed party in those reports, it would lead to the “avalanche of suits” that immunity must protect against. *Forrester*, 484 U.S. at 226.

Moreover, “the threat of liability” could create perverse incentives that would likely inhibit it in the “proper performance of [its] duties.” *Forrester*, 484 U.S. at 223. The threat of “harassment by unfounded litigation would cause a deflection,” *Imbler*, 424 U.S. at 423, in SafeSport’s duties to “safeguard[] amateur athletes against abuse, including emotional, physical, and sexual abuse, in sports,” 36 U.S.C. § 220541(a)(2). SafeSport simply cannot effectively serve its purpose of protecting amateur athletes if it is subject to the threat of liability for every eligibility decision it makes.

Plaintiffs attempt to avoid this conclusion by arguing that they are not attempting to litigate SafeSport’s eligibility ruling as it relates to Jean Lopez. Resp. 6. At the outset, I disagree with the premise of this argument. The SAC repeatedly indicates that Plaintiffs’ alleged injuries arise from SafeSport’s decision to lift its lifetime ban on Jean Lopez. *See* SAC ¶¶ 481–82, 520, 597, 651, 720. Plaintiffs cannot reframe their claim simply to avoid an immunity defense. *Pfannenstiel*, 477 F.3d at 1159 (when determining whether a party is entitled to immunity, “[t]he key question . . . is whether the claim at issue arises out of a decisional act . . . regardless of the nominal title”

of the claim). Here, Plaintiffs are attempting to litigate SafeSport's decisional act, and their attempt to reframe their claims is unpersuasive.

But to proceed with Plaintiffs' argument, they suggest their claims actually "arise out of SafeSport's failure to properly investigate and to ensure that mechanisms for 'reporting, investigat[ing], and resol[ving . . .] alleged sexual abuse are independent and reasonable.'" *Id.* at 7 (alterations in original) (quoting 36 U.S.C. § 220541(a)(4)). However, this argument is fatal to their position, because "[t]here is no question in this circuit that prosecutors are absolutely immune from liability for allegedly failing to conduct an adequate, independent investigation of matters referred to them for prosecution." *Pfeiffer*, 929 F.2d at 1490.

Finally, Plaintiffs argue that Congress expressly "declined to provide [SafeSport] immunity" for the type of claims alleged in this suit. Resp. 6. To support his argument, Plaintiffs cite to 36 U.S.C. § 220541(c)(2). That section provides:

(2) Preservation of rights.--Nothing in this section shall be construed as altering, superseding, or otherwise affecting the right of an individual within the Center's jurisdiction to pursue civil remedies through the courts for personal injuries arising from abuse in violation of the Center's policies and procedures, nor shall the Center condition the participation of any such individual in a proceeding described in paragraph (1) upon an agreement not to pursue such civil remedies.

SafeSport responds by arguing that the above passage does nothing to limit its common law immunity. I agree with SafeSport. This statute has two effects, neither of which speaks to the issue of immunity. First, it preserves an athlete's rights to pursue civil remedies for instances of abuse. Second, it articulates that SafeSport may not condition an athlete's participation in its adjudicatory process on the athlete's agreement not to pursue civil remedies. This statute simply has no bearing on whether SafeSport is immune from suit arising from its eligibility decisions.

Nothing in this Recommendation should be interpreted as suggesting that Plaintiffs are simply "disgruntled litigants." *Forrester*, 484 U.S. at 225. I have previously recognized that

sexual abuse of athletes within the Olympic community is a matter of “national concern.” Order Den. Mots. Stay 8, ECF No. 114. But “overriding considerations of public policy” provide SafeSport immunity from the type of claims the Plaintiffs assert here. *Jones*, 2014 WL 12782792, at *5 (quoting *Forrester*, 484 U.S. at 224). “[T]here are certain persons whose special functions require a full exemption from liability for acts committed within the scope of their duties.” *Pfannenstiel*, 477 F.3d at 1159. SafeSport is such an entity and should be dismissed from this suit.

CONCLUSION

Accordingly, I respectfully RECOMMEND that SafeSport’s Motion to Dismiss [filed September 24, 2018; ECF Nos. 105] be **GRANTED**.³

Respectfully submitted this 6th day of March, 2019, at Denver, Colorado.

BY THE COURT:



Michael E. Hegarty
United States Magistrate Judge

³ Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party’s failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual and legal findings of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

